This chapter will discuss estoppel and whether this doctrine can apply to acquisition of title to land in Arizona.

IN GENERAL

"Estoppel means that party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly." Graham v. Asbury, 540 P. 2d. 656, 112 Ariz. 184.

Estoppels are said to be of three kinds:

1. By 'record'- these are preclusions to deny the facts and statements that have been set forth in a judicial or legislative proceeding.

2. By 'deed'- this is when a grantor of a warranty deed that does not have title at the time of the conveyance, but acquires title after a conveyance is estopped from denying that he had title at the time of the conveyance. This type of estoppel applies to a warranty deed and not a quitclaim deed since a quitclaim deed only coneys the rights that the grantor may hve had at the time of the conveyance.

3. by matter 'in pais', or 'equitable estoppel'. Most cases involving estoppel are of this kind.

"Equitable estoppel or estoppel in pais, is the doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." Mitchell v. McIntee, 15 Or. App. 85, 514 P. 2d. 1357, 1359.

From review of this definition of estoppel in pais, it would seem like the doctrine of estoppel could be applied in many different situations. However, estoppel is designed to promote justice and equity where without its application there might be injustice. The doctrine of estoppel (estoppel in pais) is based upon morals and ethics of fair dealing. Estoppel presumes error on one side and fraud or fault on the other side. It asserts silence upon one party to prevent the fraud or falsehood to occur. The primary goal of estoppel is to <u>prevent a fraud</u>.

Another term that is used in this chapter is "laches". The doctrine of laches is based upon the principle that equity benefits the aggressive and not those that "sleep on their rights". Failure to assert ones right may result in a bar for relief in a court of equity.

ESTOPPEL IN ARIZONA

Few cases exist in Arizona that use estoppel in attempt to gain title to land.

The primary case to date in Arizona resulted in an overturned decision of a trial court's judgement that gave title to a strip of land by estoppel in pais. The appeals case was that of Desruisseau v. Isley, 553 P. 2d. 1242, 27 Ariz. App. 257.

The facts of this case were that the Desruisseau and Isley properties were adjoining each other. A dividing fence line existed nine feet onto the Isley property. Desruisseau entered upon the nine foot strip of land and made substantial improvements thereto. Isley apparently stood by and watched the improvements made and said or did nothing, whereas it seems Isley should have said something in good faith. The trial court agreed to application of estoppel. Isley was estopped from claiming title to the nine foot strip of land and title was given to Desruisseau. The court of appeals reversed this decision and stated:

"With certain exceptions, such as passage of title by descent and distribution, operation of law, eminent domain and adverse possession, title to real property may be transferred only by an instrument in writing as specified by A.R.S. 33-401. We hold that estoppel is unavailable as theory by which Isley can be divested of legal title. To hold otherwise would, among other things, render ineffective A.R.S. 12-256 pertaining to adverse possession."

Another case where estoppel was asserted in attempt to separate legal title was the case of City of Tucson v. Melnykovich, 457 P. 2d. 307, 10 Ariz.App. 145 (1969). The premise for estoppel was set as follows, when the City of Tucson (appellant) argued that:

"....since 1953, tax statements sent to appellee by the Pima County Treasurers have described appellee's land "less" the 20-foot strip in question, and that, in 1963, appellee executed a mortgage which excepted the same portion, and argues that appellee is barred by estoppel and laches."

The court upon considering all of the facts stated that:

"Waiver of ownership in real property is not lightly found....and we see nothing whatever in the record to compel this conclusion... There was no showing that appellee prepared the mortgage, or any explaination as to why the 20-foot strip was excepted from either the tax reciepts or the mortgage. One in peaceful possession of all that he claims is not chargeable with laches, see 30A C.J.S. Equity section 116(c), at p. 61 et. seq., and strict application of the doctrine of laches is required "* * * when the effect is to divest men of their estate and land".... We do not think that mere reciept of the tax bills excepting the strip and failure to make inquiry on the subject in that connection meets the test."

With respect to these two cases it is apparent that Arizona courts will not apply estoppel to separate legal fee title based on one's inaction. This doctrine is taken very seriously when it comes to divesting "men of their estate and land".

One other case of importance tested this idea. It involved a railroad company that had constructed their tracks out of the designated right-of-way. A subsequent purchaser had knowledge of the encroachment when they bought the parcel adjoining the railroad right-of-way. The landowner then allowed the railroad company to make improvements in the area encroaching onto their private property. The case was that of Boyd (appellants) v. Atchison (appellees), Topeka and Santa Fe Railway Company, 39 Ariz. 154, 4 P.2d. 670. The court stated as follows:

"So, too, it has been frequently held that if a landowner, knowning that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages...And we have in the case of Donohoe v. El Paso & S.W.R. Co., 11 Ariz. 293, 94 Pac. 1091, expressly approved of such holding."

This case of Boyd v. Atchison Etc. Ry. Co. went on to quiet title for only an easement to the railroad company, as follows:

"The judgement of the trial court as rendered is reversed and the case remanded, with instructions to enter judgement quieting appellants' title in fee to all of the homestead entry of decedent not embraced in either the east or west bound right of way, together with a reversionary interest to the land embraced in the east-bound right of way, and quieting appellee's title in fee to the land in the west-bound right of way acquired under the

act of Congress, and to an easement in the land covered by the east-bound right of way."

Also, the Desrussieau case made it clear that estoppel will not be applied to separate legal title when there are other statutory considerations. Perhaps this concept is derived from a rule stated in 28 Am. Jur. 2d., section 3, p. 601 as follows:

"It is a rule that estoppel should be resorted to solely as a means of preventing injustice and should not be permitted to defeat the administration of the law, or to accomplish a wrong or secure an undue advantage, or to extend beyond the requirements of the transaction in which they originate."

Close review of the Desruisseau v. Isley case reveals that elements for adverse possession did in fact exist(except for the statutory time period for possession), and also the basic nature of the case was not to quiet title to the nine foot strip of land, but it involved a violation of zoning laws. The quiet title aspect of the case was incidental to the purpose of the suit as it was a counterclaim by Isley. (This case is included in this chapter for review).

Another case involving estoppel was that of Horizon Corp. v. Westcor, Inc. (App. 1984) 142 Ariz. 129, 688 P. 2d. 1021. In this case a seller, by its conduct, aided the purchaser in an attempt to rezone a piece of property. The contract expired and the seller was estopped from asserting that the contract had expired because the seller continued to assist the buyer and the buyer continued spending money on the project. The sale was ordered. This case used estoppel to enforce a contract.

Another relevant case is that of Allyn v. Schultz, 48 P. 960, 5 Ariz. 152. The facts of this case in brief are: A seller of a mining claim took a buyer onto the land and pointed out physical monuments marking the boundaries of the claim. The seller was an adjoiner. The buyer did purchase the claim and proceeded to make valuable improvements to it. The conditions on the ground subsequently presented facts (a second set of monuments) that conflict with the monuments pointed out in the sale. There was an overlap. The seller of the claim filed suit to claim that portion of the overlapping claims. The trial court rendered a decision in favor of the plaintiff. The court of appeals reversed the decision and asserted a rule from several authorities:

"A party is estopped to deny the line between his own and the adjoining land to be the true line, if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line."

CONCLUSIONS

With limited case law in Arizona it is difficult to predict many generic outcomes of cases asserting estoppel. The cases included in this chapter should be reviewed and considered within their specific context. It would be interesting to speculate that if in either the Desruisseau case or the Melnykovich case there had been very positive fraudulant action by either Isley or Melnykovich, respectively, whether the court(s) would have chosen to apply estoppel.

The Desruisseau v. Isley case did not apply estoppel to separate legal title from a party where; the legal boundary line was clear and locatable, where there were other legal considerations, and where estoppel was based upon one's inactions rather than false or fraudulant and inducive actions.

The Melnykovich case did not apply estoppel where the facts showed no fraud or deciept, and also was based upon one's inactions.

The Allyn v. Schultz case did apply estoppel to define a boundary line relied upon during a conveyance.

The case of Boyd v. Atchison, Topeka and Santa Fe Railroad Company did favor estoppel to grant an easement to a railroad company who had made substantial improvements outside of their right-of-way, when the landowner knew of the encroachments and permited the improvements through inaction.

The Horizon v. Westcor case applied estoppel to fulfill a contract.

With all of these considerations it is important to understand what the elements of estoppel are, and that estoppel can be and has been applied for certain situations involving real estate in Arizona. Therefore the surveyor, realtor, title person or other party to a conveyance of real estate should always act in good faith and honestly so as to avoid creating conditions of estoppel. It is also appropiate to always 'be on the lookout' for elements of fraud or deceit.

27 Ariz.App. 257

Roland R. DESRUISSEAU and Vera Desruisseau, his wife, and Pauline Lester, a single woman, Appellants and Cross-Appellees,

v.

Guy ISLEY and Mary Ann Isley, his wife, and Isley's Refrigeration, Inc., an Arizona Corporation, Appellees and Cross-Appellants.

No. 1 CA-CIV 2865.

Court of Appeals of Arizona,
Division 1,
Department A.
July 1, 1976.

Rehearing Denied July 26, 1976.

Review Denied Sept. 9, 1976.

Action was brought to enjoin alleged actionable nuisance by adjoining property owners, who counterclaimed to quiet title to nine-foot tract in middle of two properties in question. The Superior Court, Maricopa County, Cause No. C-275491, Charles D. Roush, J., denied injunction and quieted title in plaintiffs to strip of land, and both parties appealed. The Court of Appeals, Froeb, J., held that alleged errors committed by court in determining that defendants' business was not nuisance were basically technical in nature and insufficient to defeat judgment that business was not a nuisance, and that where there never was any question as to location of dividing line between the properties and ten-year period required by statute for adverse possession had not run, ordering that ownership of strip be transferred to plaintiffs, who contended that they had relied on fence as boundary and consequently built valuable and permanent improvements on strip, was error.

Affirmed in part and reversed in part.

1. Appeal and Error ⇐1010.1(5)

Where there is reasonable evidence to support trial court's conclusion, Court of Appeals will not disturb it on appeal.

2. Appeal and Error ⇐1008.1(3)

Court of Appeals will not substitute its judgment for that of trial court in determining whether there is sufficient evidence to support judgment of trial court.

3. Nuisance ⇐65

Business activity carried on in compliance with existing zoning regulations will not be enjoined as a public nuisance since zoning regulation, of itself, involves determination by local government as to reasonableness of land use.

4. Nuisance ⇐6

Compliance with zoning ordinance is persuasive factor in determining reasonableness of activity alleged to constitute private nuisance but is not conclusive.

5. Nuisance ⇐84

Where, taking into account all findings and conclusions made by trial court, it was apparent that court decided overall question whether defendants' business constituted private nuisance by weighing facts presented and not by applying incorrect rule of law, trial court's conclusion that business activity carried on in compliance

with existing zoning regulation would not be enjoined as a nuisance had to be interpreted as applying only to claim of public nuisance and thus did not defeat determination that defendants' business was not a nuisance in action brought to enjoin such business.

6. Zoning ⇐276

Fact that commercially zoned district, in which property at issue in action to enjoin alleged actionable nuisance was situate, allowed all uses permitted in certain other city zoning classifications did not require that regulations for other classifications be read into zoning classification in question but rather only regulations enacted for such zoning classification restricted uses for district in which property was situate.

7. Boundaries ⇐47(3)

Claim of estoppel by plaintiff property owners, who alleged that they relied on location of fence as boundary and consequently built valuable and permanent improvements on nine-foot strip of adjoining property, was not available as theory by which adjoining property owners could be divested of legal title and thus, since there was never any question as to where dividing line was between the two properties and since ten-year period required by statute for adverse possession had not run, ownership of nine-foot strip remained in adjoining property owners. A.R.S. §§ 12–521, 12–526, 33–401.

L. Dennis Marlowe, Tempe, for appellants and cross-appellees.

Daughton, Feinstein & Wilson by Donald Daughton and Allen L. Feinstein, Phoenix, for appellees and cross-appellants.

OPINION

FROEB, Judge.

This dispute between two adjoining property owners brought forth a lawsuit for an injunction on the basis that conduct by one owner was an actionable nuisance. This, in turn, produced a counterclaim to quiet title to a nine-foot tract of land in the middle of the two properties. From judgments denying the injunction and quieting title, both parties appeal.

Roland and Vera Desruisseau, appellants and plaintiffs in the trial court, own a five-acre tract of land with frontage of approximately 165 feet on the south side of West Main Street in Mesa, Arizona. Pauline Lester, also an appellant and plaintiff in the trial court, is a mobile home tenant living on the property. For simplicity they are sometimes referred to collectively in our opinion as "Desruisseau." Guy and Mary Ann Isley, appellees and defendants in the trial court, own a tract of land of nearly the same dimensions immediately west of the Desruisseau property which also fronts on West Main Street. They are the owners of Isley's Refrigeration, Inc., an Arizona corporation, also an appellee and defendant in the trial court. In this opinion, we refer to them collectively as "Isley."

The Desruisseau property is primarily used as a mobile home park. The Isley property is used for the repair and installation of various accessories for motor vehicles, as well as for storage of tools and equipment used in the business.

The land involved here is commercial, zoned C–3 under the City of Mesa zoning ordinance.

Desruisseau presented proof at the trial that intense noise came from the Isley business which interfered with the peace and enjoyment of Desruisseau and the residents living in the mobile home park. The noise resulted from loud speakers, hammering and pounding of metal, sawing, drilling with electric tools and voices "practically every day and sometimes on Sunday." There was evidence that residents on the Desruisseau property found the noise "unbearable" and "beyond compare," penetrating their homes even when all windows and doors were closed. Pauline Lester testified that she lost sleep and wages because of the noise and would move if it continued. Desruisseau said he had trouble renting the

mobile homes because of the noise. There was also evidence that Isley stored scrap metal, old fuel tanks, secondhand refrigeration units, junk and concrete blocks on the property. In addition to the noise and unsightliness, Desruisseau complained of odors, dog waste, dust, blowing trash and trespassing waters.

Based on this and other evidence, Desruisseau sought a court decree enjoining Isley from further operation of the business on the property unless the noisome conditions were abated. Pauline Lester sought compensatory and punitive damages for the consequences to her from the conduct against which Desruisseau sought an injunction.

Isley, on the other hand, presented evidence generally to the effect that the noise and activity emanating from his property were necessary to the business of repairing and installing accessories on motor vehicles; that his business was, in the scope of its operation, similar to other like businesses with respect to its hours of operation, tools used and noise produced. In addition, there was evidence, which we may take as conclusive, that the operation of the business was in complete conformity with C–3 zoning in the City of Mesa.

There was, of course, considerable evidence presented to the court, beyond what we have described, relating to various aspects of the claims, some peripheral to the ultimate issues involved. Although it would serve little purpose to detail all the evidence here, one subject of exploration was the history of ownership and development of the two properties. Isley had originally operated a business of a similar nature at a different location in Mesa from 1957 to 1968. He then entered into a lease of the property involved here and conducted the business at this location, expanding it over the years. On April 1, 1973, Isley entered into an agreement to buy the property, at which time the Isley business was expanded further. George W. Cameron, Desruisseau's predecessor in interest, had acquired the adjacent property in 1949. At that time the only business on the tract, later acquired by Isley, was a gas station, the property being otherwise used for farming. By 1959, Cameron had developed a mobile home park with 24 units. He was one of the persons signing the petition seeking to have the property rezoned C–3 in 1966, following annexation by the City of Mesa. Desruisseau acquired the Cameron property in May, 1971, and expanded the number of spaces for mobile homes from 24 to 46. He knew that the Isley property, as well as his own, was zoned C–3, and was aware of the nature of the Isley business. The mobile home park has no recreational facilities and all tenants are on a month-to-month tenancy. Desruisseau lives on the property in a residence which has been there since 1950.

The area near to both the Isley and Desruisseau properties is basically commercial in nature, with West Main Street constituting the main artery between the cities of Mesa and Tempe. The street is also designated as State Highway 60–70. To the south is the Southern Pacific Railroad track. In the general area are motorcycle shops, an outdoor theater, a dairy, a manufacturing plant belonging to Motorola, a U-Haul trailer storage lot, a boat sales lot, two bars and an automobile repair shop. There is evidence that at the time rezoning was sought in 1966, the Mesa Planning and Zoning Board concluded that the entire area then being rezoned, including both properties involved here, would ultimately develop as commercial property and that residential uses should be discouraged.

[1,2] After a lengthy trial the court ruled in favor of Isley and denied the injunction. If the only question on appeal was whether there was sufficient evidence to support the judgment of the trial court, we would affirm without further discussion. It is quite apparent that there was conflicting evidence as to whether the Isley business constituted a nuisance, either public or private. It was the function of the trial court to evaluate the evidence in making this determination. Where there is rea-

sonable evidence to support its conclusion, we will not disturb it on appeal. *Aetna Loan Co. v. Apache Trailer Sales*, 1 Ariz. App. 322, 402 P.2d 580 (1965). We have said, in such situations, that we will take the evidence in the strongest light in favor of the trial court's decision. *Linsenmeyer v. Flood*, 1 Ariz.App. 502, 405 P.2d 293 (1965). It follows, of course, that we will not substitute our judgment for that of the trial court. *Bud Antle, Inc. v. Gregory*, 7 Ariz.App. 291, 438 P.2d 438 (1968).

Desruisseau contends, however, that the determination by the trial court that the Isley business was not a nuisance was based upon erroneous conclusions of law. His argument is that (1) the court believed that mere compliance with C–3 zoning was by itself a sufficient defense against a claim of nuisance, and (2) the court incorrectly interpreted the zoning ordinance.

[3, 4] We do not find that these contentions are borne out by the court's findings of fact and conclusions of law.[1] On the first issue, the court found that the noise emanating from the Isley property was reasonably related to the business under the circumstances and did not constitute either a public or private nuisance (Finding No. 5). Such a finding and indeed the lengthy trial would have been unnecessary if the court had believed that C–3 zoning was a complete defense. Likewise, the court concluded that Desruisseau failed to carry the burden of proving the allegations of the complaint (Conclusion No. 4) which also negates belief by the court that C–3 zoning was a complete defense. The

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' COMPLAINT

Pursuant to Arizona Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law on plaintiffs' complaint in this cause:

FINDINGS OF FACT

1. The plaintiffs Roland R. Desruisseau and Vera Desruisseau, his wife, are operating businesses on the following described real property located in Maricopa County, Arizona:

The East 165 feet of the East half of the Northwest quarter of the Southeast quarter of Section 19, Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, except the North 50 feet.

Said property has been zoned C–3 by the City of Mesa, Arizona, since March, 1966.

2. The defendant, Isley's Refrigeration, Inc., an Arizona corporation, is operating a business on the following described real property located in the City of Mesa, Maricopa County, Arizona:

The East half of the Northwest quarter of the Southeast quarter, Section 19, Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, except for the East 165 feet, and except for the West 330 feet thereof.

Said property has been zoned C–3 by the City of Mesa, Arizona, since March, 1966.

3. All aspects of both businesses are operated in compliance with the existing zoning regulations of the City of Mesa, Maricopa County, Arizona.

4. All aspects of both businesses are operated in compliance with all applicable city and state laws respecting public health.

5. Various noises emanate from the premises of the defendants which noises are associated with the business endeavors carried on upon those premises, although such noises from time to time may be heard upon the adjoining premises, and might interfere with attempts to sleep during the daytime. Such noises are reasonably necessary to the performance of the lawful business carried on upon the premises and under the circumstances of this case including the particular locality and zoning constitute neither a nuisance, public or private, nor a violation of the City of Mesa Noise Ordinance.

6. No right to damages has been established by any plaintiff.

CONCLUSIONS OF LAW

1. Land use controls must allow for all reasonable uses of land somewhere within each planning area.

2. A business activity carried on in compliance with existing zoning regulations for the use of land in its particular location will not be enjoined as a nuisance.

3. Residential users of land zoned for business and commercial usage may not, through injunction, require commercial users to conform to residential requirements.

4. Plaintiffs have failed to bear the burden of proof on the allegations in their complaint, and defendants are entitled to judgment against plaintiffs and each of them.

court *did* state, however, that a business activity carried on in compliance with existing zoning regulations will not be enjoined as a nuisance (Conclusion No. 2). We agree that, standing alone, this conclusion is erroneous and thus can be read to support Desruisseau's argument. The conclusion is legally correct as it pertains to a *public* nuisance. *Green v. Castle Concrete Co.*, 181 Colo. 309, 509 P.2d 588 (1973); *Urie v. Franconia Paper Co.*, 107 N.H. 131, 218 A.2d 360 (1966); *Commerce Oil Refining Corp. v. Miner*, 281 F.2d 465 (1st Cir. 1960). It is incorrect as applied to a *private* nuisance.[2] With respect to the latter, compliance with a zoning ordinance is a persuasive factor in determining the reasonableness of the activity, but it is not conclusive. *Dawson v. Laufersweiler*, 241 Iowa 850, 43 N.W.2d 726 (1950); *Weltshe v. Graf*, 82 N.E.2d 795 (Mass.1948). This is based on the principle that a zoning regulation, of itself, involves a determination by a local government as to the reasonableness of land use. *Green v. Castle Concrete Co.*, supra.

[5] Nevertheless, taking into account all of the findings and conclusions made by the court, it is apparent that the court decided the overall question of whether there existed a private nuisance by weighing the facts presented, not by applying an incorrect rule of law. We think Conclusion No. 2 must therefore be interpreted as applying only to the claim of public, as opposed to private, nuisance.

[6] The second contention made by Desruisseau is that the Isley activities violated the zoning ordinance when it is correctly interpreted. His argument here is based on the idea that regulations promulgated by the City of Mesa for other zoning districts should be deemed to apply to the commercial C–3 district in which the Isley property is situate, notwithstanding the fact that there are separate and distinct regulations for the C–3 district. More particularly, he argues that (1) since the commercial C–3 zoning specifically allows commercial C–2 uses, the C–3 uses should be subject to C–2 regulations; and (2) since industrial M–1 and M–2 zoning districts allow heavier (or more severe) uses but regulations for these uses are in certain instances more restrictive than commercial C–3 regulations, the M–1 and M–2 regulations should be deemed to restrict C–3 uses. If the contentions of Desruisseau were correct, it is apparent from the undisputed evidence that the Isley business would be in violation of the zoning ordinance. Nevertheless, the trial court found that the activities did not violate the zoning ordinance and we agree.

While it is true that a C–3 district allows all uses permitted in a C–2 district, it does not follow that the regulations applicable to C–2 must be read into C–3 merely because C–2 uses are permitted. The decision to enact regulations pertaining to each zoning district is a legislative one. It would be a simple matter to include C–2 regulations within the C–3 regulations if that were the desire of the City of Mesa. We must, therefore, assume that the regulations enacted for C–3, and only those regulations, restrict the C–3 uses.

Likewise, we perceive no reason to read the regulations for M–1 and M–2 into the uses permitted in C–3. The mere fact that M–1 and M–2 zoning classifications permit heavier industrial type uses but at the same time regulations thereunder contain greater control over noise, odors and activities than do the C–3 regulations, is again a legislative determination made by the City of

2. The Arizona Supreme Court has said:

> The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 183, 494 P.2d 700, 705 (1972).

Mesa. Desruisseau has referred us to no rule which would require the M–1 and M–2 regulations to be read into the C–3 regulations and we know of none.

In summary, while we recognize that the findings and conclusions of the court have shortcomings which could have been cured by amendments urged by Desruisseau following the trial, we nevertheless conclude that the alleged errors are basically technical in nature and are insufficient as a matter of law to defeat the judgment.

THE ISLEY COUNTERCLAIM TO QUIET TITLE

[7] We find error in the judgment of the trial court purporting to quiet title in Desruisseau to a nine-foot strip of land belonging to Isley.

The Isley and Desruisseau properties involved here lie side-by-side. For reasons which do not clearly appear, the fence on the easterly side of the Isley property is not erected on the property line which forms the western boundary of the Desruisseau property. Instead, it is placed nine feet west of the property line. It thus has permitted Desruisseau to enter upon and make improvements to the nine-foot strip as though it were part of the Desruisseau property. There is no dispute as to the correct legal title to either the Isley or Desruisseau property. The records show, without question, that Isley owns legal title to the nine-foot strip.

It is not contended that Desruisseau acquired title to the strip by adverse possession. The ten-year period required by A.R.S. § 12–526 had not run when the complaint was filed.

The claim by Desruisseau of ownership of the nine-foot strip is based upon estoppel. His argument is that he relied on the fence as the boundary and consequently built valuable and permanent improvements on the nine-foot strip. He further argues that Isley stood by watching the improvements being placed on the land and said or did nothing. The trial court agreed and concluded that Isley was estopped to claim ownership. By its judgment it ordered that ownership of the strip be granted to Desruisseau. We hold this was error.

With certain exceptions, such as passage of title by descent and distribution, operation of law, eminent domain and adverse possession, title to real property may be transferred only by an instrument in writing as specified by A.R.S. § 33–401. We hold that estoppel is unavailable as a theory by which Isley can be divested of legal title. To hold otherwise would, among other things, render ineffective A.R.S. § 12–526 pertaining to adverse possession. The Desruisseau claim falls squarely within the statutory definition of adverse possession:

> "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another [A.R.S. § 12–521.]

Thus, their possession of the strip could ripen into title by adverse possession only if ten years had elapsed without commencement of an action by Isley. A.R.S. § 12–526.

Desruisseau contends that the true issue was a boundary dispute which was correctly settled by the trial court. We reject this since there was never any question as to where the dividing line was between the two properties. This was at all times reflected by the legal descriptions in the deeds. There was never any contention that a boundary line consistent with the legal description could not be located. The sole issue was the legal effect of possession by one upon the other's property.

For the reasons stated, the judgment in favor of appellees and cross-appellants dismissing the complaint is affirmed. The judgment in favor of appellants and cross-appellees upon the counterclaim to quiet title is reversed.

DONOFRIO, P. J., and OGG, J., concur.

(5 Ariz. 152)

SCHULTZ et al. v. ALLYN.

(Supreme Court of Arizona. May 5, 1897.)

MINES AND MINING — ADVERSE CLAIMS — PLEADINGS—ESTOPPEL.

1. In an action under Rev. St. U. S. § 2326, by adverse claimants to a portion of a mining claim for which defendant has applied for a patent, plaintiffs must allege and prove that they are citizens of the United States, or have declared their intention to become such.

2. In such action plaintiff must establish a right in himself, good not only as against defendant, but as against the United States.

3. A mine owner, who points out to an intending purchaser of the adjoining claim certain monuments as indicating the dividing line, estops himself and his subsequent grantees from denying the truth of such representations after the other party, in reliance thereon, has purchased the adjoining claim.

Appeal from district court, Pinal county; Owen T. Rouse, Judge.

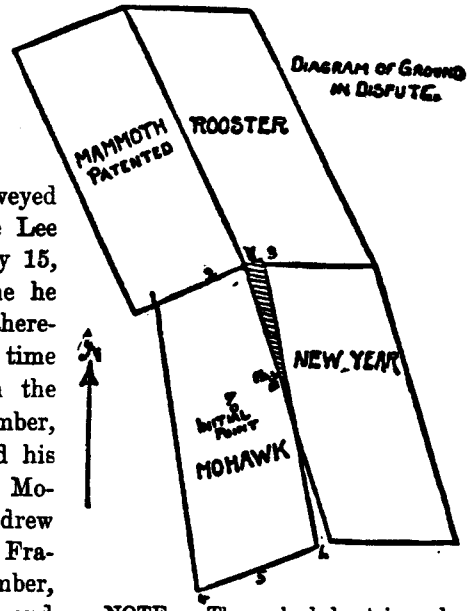
Action by Bertha Schultz and others against Noyes B. Allyn, under Rev. St. U. S. § 2326, to determine adverse claims to part of a mining claim. From a judgment for plaintiffs, defendant appeals. Reversed.

On the eighteenth day of March, 1895, Noyes B. Allyn made application before the United States land office at Tucson for a patent for the Mohawk mining claim, situated in Pinal County, Arizona. Within the time allowed by law, the appellees filed in the land office their adverse claim to a portion of the ground, asserting it to be a part of the New Year mining claim, which was owned by them. This action was brought by appellees under section 2326 of the Revised Statutes of the United States to determine their rights to the ground in conflict. The case was tried before the court below without a jury, The judgment was in favor of the plaintiffs (appellees), and the defendant (appellant) has sought this appeal.

The following diagram will show the relative positions of the Mohawk and New Year claims, and the ground in controversy.

The Mohawk claim was located on December 7, 1881, by the plaintiff Frank Schultz and one R. C. Wood. It is under this location that defendant, Allyn, claims title. The New Year claim was located on January 1, 1885, by plaintiff Frank Schultz. It is under this location that all the plaintiffs claim title. Frank Schultz sold one-fourth interest in the Mohawk to plaintiff Bauer in September, 1882, and his remaining in-

terest to one Eugene W. Aram on July 31, 1882. Since 1882 he has had no further interest in the Mohawk Mine. Wood, the other locator, conveyed all his interest to one Lee H. Newton on January 15, 1883, since which time he has had no interest therein, and since which time he has never been on the ground. In September, 1884, Newton conveyed his one-half interest in the Mohawk claim to Andrew Damm and James G. Fraser. So that in September, 1884, Damm, Fraser, and John Bauer were the owners of the Mohawk claim. In 1884,—about the time that Damm and Fraser purchased their interest,—the plaintiff Schultz went onto the Mohawk claim with them, and pointed out to them its monuments. The monuments he then pointed out are the same as shown by figures 1, 2, 3, 4, 5, and 6, on the foregoing diagram. Schultz then explained to both Damm and Fraser that he believed the ledge swung around to the west, and for that reason he had placed the monuments of the Mohawk in that particular position. About three months after Schultz had pointed out and designated to Damm and Fraser where the monuments of the Mohawk claim were, and the boundaries of the claim had been agreed upon between them, he (Schultz) located the New Year Mine. Prior thereto the ground covered by the New Year claim was unappropriated public land, and it was unappropriated when Schultz pointed out the monuments of the Mohawk in 1884. The location notice of the New Year bears date January 1, 1885. It describes the claim as



NOTE.—The shaded triangular strip between the Mohawk and New Year is the ground in dispute in this action. It is 94 5-10 feet wide at its base on the north, and is 1,100 feet long.

joining the Mohawk on the east. Later in the year 1885, Damm, Fraser, and Bauer, as owners of the Mohawk claim, had a survey made of the same by Gustavus Cox, a United States mineral surveyor. This surveyor erected regular mineral monuments at the points where the old monuments were. Each of these monuments consisted of a post four by four inches and four feet high, surrounded by a mound of stones. Cox also made a survey and map of the adjoining claims at the time. It shows the Mohawk Mine to be situated and located as now claimed by defendant, Allyn. The monuments so erected by Cox, Damm, and Fraser have remained there ever since. They have been known to every one as marking the boundaries of the Mohawk claim. Andy Collins, Martin Derrig, Thomas L. Bailey, Damm, Fraser, and many other witnesses testified that those monuments of posts and stones were known all around that neighborhood as the Mohawk monuments. In 1890, Thomas Armstrong, a mining engineer, was employed by the Mohawk Mining Company to make a contour map of all the claims belonging to that company, and of the adjoining claims. In making this survey, in 1890, he met plaintiff Schultz on the Mohawk Mine. Shultz then pointed out to Armstrong the monuments of the Mohawk, and Armstrong made a survey of the claim from the monuments as pointed out by Schultz. The monuments so pointed out by Schultz at that time were the identical monuments which Cox, Damm, and Fraser had erected in 1885. A few weeks later, and about August, 1890, Armstrong made a map from the surveys he then made, which map shows all the mines of the Mohawk Mining Company. It also shows the Mohawk and the New Year claims, as surveyed by him from the monuments so pointed out by Schultz. This map is in the records of this case, and shows the location of the Mohawk to be as claimed by defendant, Allyn. In January, 1892, the defendant, Allyn, procured from the plaintiffs Susana and John Bauer an option to purchase their interest in the Mohawk claim, and also the interest of their co-owners Damm, Fraser, and Stephens. The purchase price was to be twenty-five thousand dollars. At or about the time of the execution of this agreement, the said Bauer, Damm, Fraser, and Allyn, and also Thomas L. Bailey, who was agent for Mr. Allyn, met at Tucson, and had an extensive conversation about the Mohawk claim and its monuments and boundaries. At

this meeting a sketch-map was drawn, which showed the location of the Mohawk claim relative to the Mammoth and New Year. This sketch showed the Mohawk to be located in the same manner as did the map of Cox and of Armstrong, and it showed that the ground in dispute in this action was included within the limits of the Mohawk Mine. The plaintiffs Susana and John Bauer impressed on Mr. Allyn that this was a fact, and that the sketch correctly outlined the position and boundaries of the Mohawk Mine. It was further agreed at the same time that Damm should take defendant, Allyn, and Mr. Bailey out to the Mohawk ground, and show them the mine and the monuments of the claim. And both the Bauers and Fraser assured Mr. Allyn that they would stand by and indorse as correct everything that Damm showed him. This is not denied by the plaintiffs in the case. Accordingly, in January, 1892, Damm, as the representative and agent of all his co-owners, and particularly Susana and John Bauer, went out to the Mohawk claim with Allyn and Bailey. He took them around the claim, and pointed out to them each of the corner and center end monuments. These monuments were at the points marked 1, 2, 3, 4, 5, and 6 on the diagram herein. They were the same post monuments which had been erected in 1885, and were at the same places where Schultz had, in 1884, pointed out the original Mohawk monuments to Damm and Fraser. The boundaries of the Mohawk Mine as then designated and shown by Damm to Allyn and Bailey were the same as were described in the map of Cox and in the map of Armstrong, and now claimed by Allyn. Mr. Allyn then took possession of the Mohawk claim, under his option to purchase, and put Thomas L. Bailey in charge of it, and had him do development work thereon from that time on until July 15, 1892, when he bought the mine. While Bailey was thus in charge of the mine, doing work thereon,—to wit, on June 11, 1892,—and while Andrew Damm was also at the mine with him, Frank Schultz came on the ground, and took dinner with him. As he had been one of the original locators of the Mohawk claim, and as he was the sole locator of the New Year claim, and was then an owner thereof, Mr. Bailey requested him to show him the monuments of the Mohawk and the dividing-line between the Mohawk and the New Year. Schultz complied with this request. He took Bailey around the Mohawk claim, and pointed

out to him each of the corner and center end monuments of the Mohawk claim. He pointed out to Bailey the identical four by four post monuments which Cox, Damm, and Fraser had erected in 1885, and he (Schultz) told Bailey that those were the true and correct corner and center end monuments of the Mohawk claim. Mr. Bailey communicated these facts to Mr. Allyn. Bailey and Schultz then went to work to ascertain and determine the boundary-line between the Mohawk and the New Year. Schultz posted himself at the southeast corner of the Mohawk claim (figure 6 on the foregoing diagram), from which point he could distinctly see the northeast corner monument of the Mohawk (figure 3 on the diagram). Bailey started from this southeast monument, carrying with him an ocatillo stick with a rag tied at the end of it for a flag. He proceeded in the direction of the northeast monument. When about midway between the two monuments he stopped and faced Schultz, who remained at the southeast monument. Schultz motioned with his hat from one side to another until Bailey was in a direct line between the two monuments. Then Bailey stuck his stick in the ground and built a small monument of stones around it. Schultz came up, and it was agreed by him that this monument and the line sighted from the southeast and northeast monuments of the Mohawk was the correct boundary-line between the Mohawk and the New Year. The line is the line marked 3, 6, on the foregoing diagram. And so it was agreed that the New Year claim did not take in any of the ground of the Mohawk as bounded by the post monuments which Damm and Fraser had erected in 1885. Thereafter, and on July 15, 1892, Mr. Allyn, being satisfied with the value of the Mohawk Mine, and relying on the representations made to him and to his agent, Mr. Bailey, by the plaintiffs Susana and John Bauer and Frank Schultz, as to the location of the corner and center end monuments of the Mohawk claim, and believing from their representations that the monuments they had pointed out, and had caused others to point out, to him as being the true monuments of the Mohawk claim, were as a matter of fact the true monuments, he paid to the Bauers and their co-owners of the Mohawk, twenty-five thousand dollars, and they delivered to him their deed. And in this way did defendant, Allyn, buy the land in dispute in this action. Defendant, Allyn, continued extensive development work on

the claim after he purchased it; Mr. Bailey remaining as his manager. He erected, at great expense, a boiler and engine house, and placed therein a valuable boiler and engine, and he also erected a large stamp-mill, at about forty or fifty feet from the boundary-line between the Mohawk and New Year, as such boundary-line was settled and agreed upon by Schultz and Bailey. The ground in dispute is valuable to defendant, Allyn, for the use of this mill and machinery. The point where this mill is situated is shown in the foregoing diagram. The lower court rendered its judgment that the ground in dispute was part of the New Year claim; that of said claim Susana Bauer was the sole owner of an undivided three-eighths interest thereof, and that her said title to the ground in dispute be forever quieted as against the claim of defendant, Allyn. Plaintiffs introduced in evidence the deraignment of title of the New Year claim. This evidence showed that Frank Schultz was the owner of an undivided one-half interest therein, and that Bertha Schultz was the owner of the other half interest. It further showed that Susana Bauer did not have, and never did have, any interest in the New Year claim. The deraignment of title consists of: 1. Notice of location of New Year Mine by Frank Schultz, on January 1, 1885; 2. Deed from Frank Schultz to Bertha Schultz of a one-half interest in the New Year Mine, dated January 7, 1893; and 3. Notice and affidavit of forfeiture of John Haynes for non-performance of assessment work in 1893, the affidavit being made by Bertha Schultz. That is all the evidence produced on the trial to show that Susana Bauer is the owner of a three-eighths interest in the New Year Mine. There is no evidence in the case that plaintiffs are citizens of the United States or have declared their intention to become such. There is no such averment in their complaint. Judgment was rendered that plaintiff Bertha Schultz was the owner of five-eighths, and plaintiff Susana Bauer was the owner of three-eighths, of the New Year Mine, and that the land in dispute belonged to them. Defendant filed his motion for a new trial, which was overruled, and he has perfected this appeal.

Selim M. Franklin, for Appellant.

J. S. Sniffen, for Appellees.

HAWKINS, J. (after stating the facts).—There are numerous errors assigned, only a few of which we deem it necessary to notice. The object of this suit, it will be seen from the statement of facts, was to adverse Allyn in the obtaining of a patent to the Mohawk Mining claim. The complaint does not allege, nor is it proved, that any of the plaintiffs were citizens of the United States or had declared their intentions to become such. Defendant claims error in overruling the general demurrer on this account. The complaint prays that plaintiffs' title be quieted, and they (plaintiffs) claim it is not necessary to allege or prove citizenship in such a case. This claim is true in an ordinary action to quiet the title to mining claims between individuals (*Thompson* v. *Spray,* 72 Cal. 528, 14 Pac. 182; *Moritz* v. *Lavelle,* 77 Cal. 12, 18 Pac. 803; *Souter* v. *Maguire,* 78 Cal. 544, 21 Pac. 183), but this is not such a case. The object of this suit (being an adverse) is to quiet the title between these individuals and the United States. It will not do to say that the mere form of the complaint is to govern in this class of cases. Section 2326 of the Revised Statutes of the United States does not provide what form of action shall be brought. It may be ejectment, a suit to try the right to real property under the statute, or an action to quiet the title, or the form ordinarily used in adverse actions. Yet when it appears that the object of the suit is to adverse the party applying for a United States patent, it is necessary to both allege and prove that plaintiffs are citizens of the United States, or have declared their intention to become such. *Lee Doon* v. *Tesh,* 68 Cal. 43, 6 Pac. 97, 8 Pac. 621; *Anthony* v. *Jillson,* 83 Cal. 296, 23 Pac. 419; *Rosenthal* v. *Ives,* 2 Idaho, 265, 12 Pac. 904. If the complaint fails to allege citizenship, it is bad on demurrer. The demurrer in this case was general, and, the record shows, was formally submitted to the court below and was overruled. It was not urged by defendant, but an exception was taken. This point should have been called directly to the court below and urged. Where a point is unquestionably well taken on demurrer, counsel should call the attention of the court to the same, so the court should have an opportunity to give it the proper consideration.

The complaint not alleging citizenship of the plaintiffs, and the evidence not proving the same, would warrant a reversal

and new trial; but in examining the entire record we have concluded to consider the whole case. The testimony of Wood, an original locator of the Mohawk mining claim, shows that when this claim was located the southerly end of the Mammoth was made the northerly end-line of the Mohawk, with monuments the same; yet monuments 1 and 3 were shifted long before any rights were acquired under the New Year location, and the location as shown by the diagram was distinctly marked on the ground, and these lines and monuments pointed out by the owners of the New Year to the agent of Allyn; and, Allyn having been induced to purchase the Mohawk by such representations, they (plaintiffs) are estopped from denying the truth of the representations made by them regarding the line between the Mohawk and New Year claims. The rules of law relating to estoppel *in pais* apply to mining ground the same as any other kind of real estate. *Blake* v. *Thorne,* 2 Ariz. 347, 16 Pac. 270. The facts show that Schultz pointed out the monuments of the Mohawk claim to Allyn's agent on the boundary-line between the Mohawk and the New Year claims while Schultz was the owner of the New Year; and afterwards he quitclaimed an interest to Bertha Schultz. She, as a privy in the estate, is bound by the same estoppels as her grantor. 7 Am. & Eng. Ency. of Law, p. 23, and cases cited in notes; Bigelow on Estoppel, pp. 607, 608. "A party is estopped to deny the line between his own and the adjoining land to be the true line, if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line." Hermann on Estoppel, p. 1270, sec. 1133, and authorities cited. The deraignment of title to the New Year Mine fails to show the title as found by the court. Schultz located the mine on January 1, 1885. He quitclaimed a three-eighths interest to his wife, Bertha Schultz, January 4, 1893, and made affidavit of the forfeiture of John Haynes for non-representation for 1893. No record title is shown in either of the Bauers. No judgment should have been entered in their favor. Rev. Stats. U. S., sec. 2326, as amended March 3, 1881. In this class of cases, each party is to establish his right to the mining ground in controversy against the United States as well as against his adversary. The party filing the contest should allege and prove every step necessary to establish his right to his min-

ing claim that would be required in the land office for a patent, with the exception of advertisment and certificate of surveyor-general as to amount of work required before patent could be obtained. If the proof shows no title, or that all the requirements of the law have not been complied with, he can recover no judgment. Plaintiffs must recover on the strength of their own title, and not on the weakness of that of their adversary. *Gwillim* v. *Donnellan,* 115 U. S. 50, 5 Sup. Ct. Rep. 1110. There was a location by Schultz which on its face seems valid. Then the other plaintiffs must, before a decree is rendered in their favor, show a title in themselves based on such location. The proof is wanting in so far as Susana Bauer is concerned. The complaint does not state facts sufficient to constitute a cause of action in an adverse in not alleging the citizenship of the plaintiffs or their intention to become such. It is nowhere shown in the evidence that plaintiffs are citizens or had declared their intention to become such. It is shown that plaintiffs John and Susana Bauer sold the strip of land in dispute to Allyn as being a part of the Mohawk claim, and they are estopped from claiming the same ground as a part of the New Year or any location, so long as the Mohawk is a valid subsisting claim. The evidence shows that neither of the Bauers ever owned any interest in the New Year claim, and that Frank Schultz represented to Allyn that the monuments of the Mohawk were at the points where defendant claims them to be, and pointed out the boundary-line between the Mohawk and New Year claims to defendant, who purchased relying on the representations of Schultz. He and Bertha Schultz, his privy in interest, are estopped from denying the truth of such representations. The ground in dispute is a part of the Mohawk claim, and was never included in the New Year location. The judgment of the lower court is reversed, with directions to enter judgment for the defendant.

Baker, C. J., and Bethune, J., concur.